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Making Valid Disclaimers

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The disclaimer is easily one of the most useful devices in the estate planner's kit.¹ Using disclaimers artfully, the planner can sculpt a dispositive pattern after death has occurred and all variables are known including asset values, asset ownership patterns, needs of the family (at least as of the time of the decedent's death) and state of the tax system. All of these factors may be shrouded in uncertainty at the time the estate is planned before death and the instruments are drafted. Disclaimers permit a late opportunity to carry out the testator's wishes and to do so in a rational manner.

The problems with disclaimers tend to revolve around an unwillingness to disclaim by those receiving interests in property, even though disclaimers would clearly be in the overall family interest (but not necessarily in the disclaimant's interest), some uncertainty over who can disclaim and the technical requirements for a disclaimer to be effective.

**General rule on disclaimers.** A qualified disclaimer, for federal estate and gift tax purposes, is an irrevocable and unqualified refusal to accept an interest in property that satisfies four conditions² —

- The disclaimer must be in writing,
- The written refusal is received by the transferor of the interest, the transferor's legal representative or the holder of the legal title to the property not later than nine months after the day on which the transfer was made creating the interest (or, if later, nine months after the person disclaiming reached age 21).³ A disclaimer executed by the attorney for the personal representatives may be qualified.⁴
- The person must not have accepted the interest or any of its benefits before making the disclaimer including the exercise of a power of appointment.⁵
- Making the disclaimer;⁷ (3) but paying costs for the disclaimant's support and maintenance from the decedent's estate is a disqualifying benefit;⁸ and (4) acceptance by a beneficiary of the incidents of ownership intrinsic to a decedent's general partnership interest by exercising the estate's limited partner votes, in the capacity of personal representative, as well as limited partner votes to be elected as the successor general partner prior to the renunciation has been held to be an acceptance of benefits and so a disclaimer was not qualified.⁹

- Finally, the interest must pass to a person other than the person making the disclaimer as a result of the refusal to accept the property.¹⁰

**Who can disclaim.** Disclaimer by the individual holding an interest poses few problems. But problems arise if someone acting on behalf of another disclaims or the holder of the property interest involved is somehow incompetent.

- An executor or administrator can make a qualified disclaimer on behalf of a decedent if authorized to make a disclaimer under local law and if the personal representative has the authority to act at the time the disclaimer is made.¹¹ If a beneficiary is also a fiduciary, actions taken in the exercise of fiduciary powers to preserve or maintain the disclaimed property are not treated as an acceptance of the property or any of its benefits.¹²
- A trustee may be given the power to disclaim in the trust instrument but otherwise the trustee is not the person to file the disclaimer inasmuch as it is the beneficiaries who have the rights and beneficial interests in trust assets.¹³
- With respect to guardians or custodians for minors, a beneficiary under the age of 21 has until nine months after reaching the twenty-first birthday to make a qualified disclaimer.¹⁴ Any action taken prior to the time the beneficiary reaches age 21 is not an acceptance by the beneficiary of the interest.¹⁵ Disclaimers by parents as general guardians on behalf of minor children have been approved where accepted by a court and the minors were represented by a guardian ad litem.¹⁶ The regulations do not address the question of when a custodian may disclaim for a minor.
- A disclaimer by a personal representative for an incompetent may be a qualified disclaimer.¹⁷ In general,
FOOTNOTES

1 See generally 5 Harl, Agricultural Law § 46.08(1991).
2 I.R.C. § 2518(b).
3 Est. of Fleming v. Comm'r, T.C. Memo. 1989-675 (disclaimer of property passing to decedent's estate under husband's will not timely because not made within nine months of death; estate argument that disclaimer timely if within nine months after will admitted to probate unsuccessful).
4 See Ltr. Rul. 8607013, Nov. 14, 1985 (possible beneficiaries of special power of appointment of surviving spouse over testamentary marital trust corpus must disclaim interests within nine months of creation of trust).
6 See Est. of Selby v. U.S., 84-1 U.S.T.C. ¶ 13,556 (10th Cir. 1984); Ltr. Rul. 8701001, Aug. 19, 1987 (disclaimer by guardian of minor heirs effective where disclaimer increased estate of surviving spouse of whom minors were also heirs); Ltr. Rul. 8749041, Sept. 4, 1987 (disclaimer by executor of one estate's interest in property of another estate held valid where executor was also eventual beneficiary of both estates); Ltr. Rul. 8749013, Aug. 26, 1989 (disclaimer of surviving spouse's interest in trust resulted in gift to other trust beneficiaries where, although surviving spouse had not received any distributions, trustees had discretion to distribute income and principal to spouse; attempt to remove trustee's discretion by renunciation ineffective).
8 Ltr. Rul. 8527087, no date given.
11 I.R.C. § 2518(b). See Ltr. Rul. 8326110, March 30, 1983 (disclaimer by daughter as mother's personal representative was qualified even though property passed to daughter as result).
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